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Reasons for decision

415607 Ontario Limited, o/a Waterford Crushing
and Screening,

applicant,

and

International Longshoremen's Association,
Local 1654 and Maritime Employers Association,

respondents.

Board File: 28766-C

Neutral Citation: 2011 CIRB 600

July 12, 2011

The Canada Industrial Relations Board (the Board) composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. John Bowman and Patrick J. Heinke, Members, considered the above-noted application.

Having reviewed the written submissions of the parties, the Board is satisfied that it has sufficient information to determine the above-cited application without an oral hearing and exercises its discretion pursuant to section 16.1 of the *Canada Labour Code (Part I - Industrial Relations)* (the *Code*) to decide the matter without an oral hearing.

Counsel of Record

Mr. Richard D. Simmons, for 415607 Ontario Limited, o/a Waterford Crushing and Screening,
Mr. Ronald A. Pink, Q.C., for the International Longshoremen's Association, Local 1654,
Mr. John Mastoras, for the Maritime Employers Association.

I–Nature of the Application

[1] By letter dated May 12, 2011, 415607 Ontario Limited, doing business as Waterford Crushing and Screening (Waterford or the applicant), requests that the Board exercise its discretion pursuant to section 18 of the *Code* to reconsider a decision it rendered on April 21, 2011, *Maritime Employers Association*, 2011 CIRB 581 (RD 581). The applicant alleges that there are facts that were not put before the Board at the time of the hearing that led to RD 581; that the Board made an error of law; and that the Board failed to respect a principle of natural justice as it lacked evidence to support the order for damages that the Board made in that decision.

II–Background

[2] Waterford's core activity is the production of aggregates (gravel) of all types. It also carries on other activities, including slag and pelletizing operations that turn waste materials from the manufacturing process into usable materials for other purposes. Waterford has a longstanding relationship with US Steel Canada (formerly Stelco) in Hamilton, Ontario; the details of Waterford's activities on behalf of US Steel are set out in RD 581. In the course of proceedings before the Board in another matter, Board file 27443-C, Waterford conceded that, for the purpose of certain of its activities in the Port of Hamilton, it was an employer in the longshoring industry, bound by the geographic certification order held by the International Longshoremen's Association, Local 1654 (ILA 1654). As a result of this admission, the Board issued a consent Order on November 9, 2009, declaring Waterford to be an employer in the longshoring industry in the Port of Hamilton and confirming that Waterford was bound by the ILA 1654 geographic certification order. Subsequent to this order, Waterford advised US Steel that it would no longer provide longshoring services in the Port of Hamilton. However, in early June 2010, ILA 1654 became aware that vessels were being loaded at the US Steel pier in Hamilton (Pier 16) using Waterford employees. In the context of a grievance regarding this issue, the Maritime Employers Association (MEA) referred a question to the Board pursuant to section 65 of the *Code*, asking the Board to define the proper scope and interpretation of "longshoring" work at the Port of Hamilton. The Board's decision on this question, RD 581, was rendered on April 21, 2011. It is this decision that Waterford requests the Board to reconsider.

III-Positions of the Parties

A-Waterford

[3] Waterford states that there are new facts, which were not available at the time the Board issued its decision that, if known, would likely have caused the Board to arrive at a different conclusion. Waterford alleges that members of ILA 1654 were refusing to work at the US Steel site because to do so would require them to cross a picket line and that, in any event, the ILA 1654 could not supply workers trained to operate the loaders used to perform the work Waterford was doing.

[4] Secondly, Waterford alleges that the Board misinterpreted the definition of "longshoring." Waterford's application does not provide any details with respect to this allegation.

[5] Thirdly, Waterford suggests that the Board failed to respect a principle of natural justice by reaching the conclusion that it did and awarding damages without any evidence that ILA 1654 had members available to do the work in question and that these union members would have crossed the picket lines.

B-MEA

[6] The MEA alleges that the application for reconsideration should be dismissed as untimely and an abuse of the Board's process, because it was filed more than 21 days after the date of RD 581. Section 45(2) of the *Canada Industrial Relations Board Regulations, 2001* (the *Regulations*) establishes a 21-day time limit for applications under section 18 of the *Code*. The MEA points out that Waterford consented to an order declaring that it was an employer in the longshoring industry and bound by the geographic certification order for the Port of Hamilton (Board file 27443-C).

[7] The MEA also submits that the application is without merit. It points out that there was undisputed evidence before the Board that ILA 1654 members were attending to work for another employer, Great Lakes Stevedoring Co. Ltd. (GLS), at the US Steel site at the time in question, and

thus that one could draw the necessary inference that ILA members were willing and able to cross the picket line to work at the US Steel site.

[8] The MEA also argues that, even if the facts now alleged by Waterford are true, they are not “new” and were available to Waterford at the time of the hearing in April 2011. It states that Waterford could and should have brought any relevant evidence before the Board at the time of the hearing; as this alleged fact was fully available to Waterford at the time of the hearing, the applicant cannot use its own negligence as a ground for reconsideration.

[9] The MEA also argues that, even if these facts were true and had been brought to the attention of the Board during the hearing, they would not have caused the Board to arrive at a different conclusion. They do not justify Waterford’s failure to comply with the collective agreement between the MEA and ILA 1654, which contains mechanisms to address circumstances in which the union is unable to supply adequate or sufficiently skilled labour through its hiring hall. Waterford failed to use those mechanisms.

[10] The MEA points out that Waterford provides no details as to the error of law or policy that the Board is alleged to have made. In the MEA’s view, the Board correctly expressed and applied the legal test for longshoring set out by the Federal Court of Appeal in *Cargill Grain Company Limited, Gagnon and Boucher Division v. International Longshoremen’s Association, Local 1739, et al.* (1983), 51 N.R. 182 (F.C.A., no. A-799-81).

[11] With respect to Waterford’s third ground for reconsideration, the alleged denial of natural justice, the MEA points out that the evidence before the Board established that Waterford ignored the collective agreement and used its own employees to perform the work that should have been performed by ILA 1654 members. The MEA submits that there was sufficient evidence before the Board on which it could reasonably find as it did.

[12] The MEA requests that the application for reconsideration be dismissed as untimely and lacking in merit.

C-ILA, 1654

[13] ILA 1654 states that Waterford's alleged new facts are not true. Although the United Steelworkers of America, Local 1005 (USW 1005), was on strike against US Steel and was picketing the worksite, ILA 1654 had a verbal agreement with USW 1005 that ILA 1654 members could cross the picket line to perform work within their jurisdiction, so long as they did not perform work within USW 1005's jurisdiction. As evidence of this, ILA 1654 points out that the evidence before the Board demonstrated that its members were working for GLS on the US Steel site at the time in question, and thus that they were clearly not refusing to cross the USW 1005 picket line.

[14] ILA 1654 also refutes Waterford's suggestion that it could not supply trained personnel to do the Waterford work, and states that it does have members who have the skills to operate front end loaders. ILA 1654 states that, had Waterford called the hiring hall, as required under the collective agreement, men would have been provided. ILA 1654 states that Waterford knew or ought to have known this prior to the date of the hearing.

[15] ILA 1654 submits that Waterford has referred to no evidence or case law to support its allegation that the Board made an error of law or policy. ILA 1654 contends that the Board correctly set out and followed the proper jurisprudence in RD 581.

[16] Furthermore, ILA 1654 argues that there is nothing in the reconsideration application that could not have been placed before the Board during the original proceedings. There was ample opportunity for all parties to present their case and their position, and at no time during the hearing did Waterford suggest that there were insufficient workers to provide services to Waterford. The evidence before the Board was that ILA 1654 was providing labour to GLS at the time, which indicates that these union members were prepared to cross the picket lines.

[17] In summary, ILA 1654 states that there is no foundation for Waterford's reconsideration application and that it should be dismissed.

IV—Analysis and Decision

[18] Board decisions are intended to be final (see section 22 of the *Code*). Although section 18 of the *Code* provides the Board with the power to review, rescind, amend, alter or vary any order or decision made by it, the reconsideration of decisions is the exception, not the rule (see *Ted Kies*, 2008 CIRB 413).

[19] In the instant case, the Board finds that there is no merit in the grounds for reconsideration alleged by the applicant. With respect to the allegation of new facts, both the MEA and ILA 1654 state that the union had sufficient numbers of qualified members available to do the work and that these members were prepared to cross the USW 1005 picket line, had Waterford placed an order with the hiring hall, as mandated by the collective agreement. Accordingly, the alleged new facts are incorrect. Even if these facts had been true, it was incumbent on Waterford to place this allegation, which was readily available to it, before the Board at the time of the original hearing (see *TurnAround Couriers Inc.*, 2010 CIRB 544 at paragraph 7).

[20] With respect to the allegation that the Board made an error of law or policy, the applicant has failed to adduce any facts or jurisprudence supporting this claim. The Board is confident that it correctly interpreted and applied the jurisprudence regarding the scope of longshoring work and that no error of law or policy is contained in RD 581.

[21] Lastly, with respect to the alleged denial of natural justice, the Board is of the opinion that the applicant is attempting to reverse the onus of proof by suggesting that the Board reached a conclusion that lacked an evidentiary foundation. The evidence before the Board was that the work in question was longshoring work that fell within the jurisdiction of ILA 1654. If Waterford wished to adduce evidence to the contrary, or allege that ILA 1654 was unable to supply qualified labour or that the union members would not cross the USW 1005 picket line, it had the responsibility to do so at the time of the Board's proceedings. As Waterford failed to put forward any evidence to support these contentions, it was open to the Board to proceed on the basis of the evidence that was properly before it.

[22] For all of these reasons, the application for reconsideration of RD 581 is dismissed. This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

John Bowman
Member

Patrick J. Heinke
Member